United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

585.

No. 22,170

David Atkinson, Appellant

v.

United States of America, Appellee

On Appeal from the United States District
Court for the District of Columbia

Francis J. Ferguson
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Statement of Questions Presented

1) The question is whether the evidence presented in this case was sufficient to sustain the verdict of guilty rendered therein.

2) The question is whether the lower Court charged the jury as to a crime for which the Appellant was not indicted thereby permitting a verdict of guilty with respect thereto.

3) The question is whether the Court correctly stated the law in its definition of the essential elements of the crime of unauthorized use of a motor vehicle.

4) The question is whether the indictment in this case was defective.

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* This case has not been previously before this Court.

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IN THE

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal of a judgment of conviction and sentence by the United States District Court for the District of Columbia on July 5, 1968. This Court has jurisdiction of the appeal pursuant to 28 U. S. C. 1291.

Statement of Case

This is an appeal from a conviction of Appellant of the offense of Unauthorized Use of Vehicle (22 D. C. Code

§2204) and Interstate Transportation of Stolen Vehicle (18 U. S. C. §2312).

W. Barrett Fuchs, the owner of the vehicle involved at the time of the alleged crime died prior to the trial of the case. At the time of the alleged offense he lived in Bethesda, Maryland, and was a teacher at Western High School in the District of Columbia. (Tr. pp.13, 14). At 8 o'clock A. M. on September 22, 1967, he left his home in his automobile (Tr. p.22) and at 5:30 o'clock P. M. he telephoned his wife. He was very upset and had just telephoned the police. (Tr. p.23). At such time he and a Metropolitan Police Department officer searched the area around 35th and R Streets, N. W., Washington, D. C. searching for Mr. Fuchs' automobile, but they did not find it. He was a little upset that his car was missing. (Tr. pp.38, 39, 40). Mr. Fuchs was driven home by a fellow teacher in the fellow-teacher's automobile and was very upset upon his arrival home. (Tr. pp.23, 24).

At about 10:30 o'clock P. M. on the aforesaid date, the Appellant went to a community party at the Ambassador Theater. (Tr.pp.82, 83). Upon leaving the party in the early hours of September 23, 1967, he and two others be-

gan talking to three people who were sitting in Mr. Fuchs' car. Appellant did not know the occupants of the car. The car occupants invited them to drive to Baltimore, Maryland, to go to a party. They accepted and were driven to Baltimore by the person who was driving the car when Appellant first met the car occupants. (Tr. pp.87, 88). When it came time to leave Baltimore, the driver was missing and the others could not find him. They prevailed upon Appellant to drive them back to Washington. (Tr. pp.90, 91). While still in the State of Maryland, close to the District of Columbia line, the automobile was stopped at about 4:00 o'clock A. M. by a United States Park policeman for following an ambulance too closely. (Tr. pp.49, 50). The Appellant was driving the car at the time. (Tr. p.52). The Appellant was arrested by the policeman and the automobile was towed to a nearby service station. (Tr. p.56).

At about 5:00 or 6:00 o'clock A. M. on September 23, 1967, Mr. and Mrs. Fuchs received a telephone call from the police and went to the service station and picked up the automobile. (Tr. p.25).

Statutes Involved

22 D. C. Code §2204. Unauthorized use of vehicles.

Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locaility on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Mar.3, 1901 ch. 854 §826b, as added Feb. 3, 1913, 37 Stat. 656, ch. 23 §1.)

18 U. S. C. §2312. Transportation of stolen vehicles.

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, 62 Stat. 806.)

Statement of Points

1. The evidence was insufficient to sustain a con-

viction in this case.

2. The Court erred in its charge to the jury, with respect to the first count in the indictment, in that it instructed the jury as to a crime not charged in the indictment, thereby permitting a finding of guilty with respect thereto.

3. The Court erred in its charge to the jury defining the essential elements of the crime charged in the first count of the indictment.

4. The first count of the indictment was defective in that it was at variance with the controlling statute.

Summary of Argument

1. No direct evidence was introducted to prove the guilt of the Appellant and the verdict was returned on the basis of circumstantial evidence alone. The circumstantial evidence was very sketchy and was not such that a reasonable person could draw the inference or make the deduction therefrom that, beyond a reasonable doubt, the Appellant violated the terms of the controlling statute.

2. The Court instructed the jury, with respect to the charge of unauthorized use of a motor vehicle, that it could find the Appellant guilty if it found that the Appellant caused any of the offenses listed in the statute.

The indictment charged that he alone committed the alleged crime but it did not charge that he caused said crime to be committed by someone else, or otherwise. Therefore, Appellant had no opportunity to defend himself against a crime for which he was not indicted, but for which the jury was instructed that it could find the Appellant guilty.

3. 22 D. C. Code §2204 contains two distinct elements. One is the taking, use, operation or removal of an automobile from specified places and the other is the operation and driving of the automobile for the profit, use or purpose of the accused. The statute provides that the accused must take the actions prescribed in the first element or section without the consent of the owner of the automobile, but lack of consent is not required with respect to the second element. In its charge to the jury the Court reversed the requirement of lack of consent and made it a requirement as to the second element or section only and not the first as prescribed in the statute. Even if it could be interpreted that the lack of consent requirements of the charge to the jury applied to both elements of the statute it was not consistent with the terms of the statute which only required lack of consent as to one ele-

ment of the crime.

4. The indictment is defective since it only charges lack of consent with respect to the second element of the aforesaid crime, while the statute requires lack of consent as to the first element. Since Appellant was not charged with the crime indicated in the first element of the statute, he cannot be found guilty thereof.

ARGUMENT

I. The evidence was insufficient to sustain a conviction. The burden was upon the Appellee to prove the Appellant guilty beyond a reasonable doubt as to every element of the offense charged. It is submitted that the Appellee did not carry that burden and that the evidence presented was insufficient to sustain a conviction in this case. By stipulation, it was agreed that W. Barrett Fuchs was the owner of the automobile involved. He died prior to trial.

As to the alleged unauthorized use of the automobile in the District of Columbia, no direct evidence was submitted to prove that the Appellant: (1) took, used operated or removed the automobile from any place within the District of Columbia or that he caused it to be taken, used, operated or removed from any place within the Dis-

trict of Columbia, or (2) operated or drove the automobile or caused it to be operated or driven for his own use or purpose, or (3) took any of the aforesaid actions without the consent of the owner, or (4) that at the time he took any of the aforesaid actions he knew that he did so without the consent of the owner.

As to the alleged interstate transportation of a stolen motor vehicle, no direct evidence was submitted to prove that: (1) the automobile in question was stolen, or (2) that the Appellant transported it or caused it to be transported in interstate or foreign commerce or (3) that Appellant knew it was a stolen vehicle.

The only evidence submitted in this case as to any of the essential elements of the alleged offenses was circumstantial evidence. The Appellee's case was based upon the testimony of three witnesses. The essential elements of the testimony insofar as it relates to both offenses is set forth below. The gist of the testimony of Anne P. Fuchs, wife of the owner of the automobile, was to the effect that her husband left their home in the automobile on the morning of September 22, 1967 and that about 5:30 P. M. on said date he telephoned her and was very upset. He thereafter came home without the

automobile and was terribly upset at the time. Officer Joseph W. Danner of the District of Columbia Metropolitan Police Department testified that, on the same date, he responded to a radio run about 5:24 P. M. to the vicinity of 35th and R Streets, N. W., Washington, D. C. where he met the car owner, that he and the owner of the automobile searched a small area of the District of Columbia for the car but did not find it and that the owner was upset because the car was missing. Officer Thomas J. McDonnell of the United States Park Police Department testified that he stopped the car in the State of Maryland while it was being operated by the Appellant. The Appellant and another witness denied that Appellant drove or operated the car in the District of Columbia and attributed the same to another person. They also denied any knowledge that the car was stolen.

The aforesaid testimony does not prove the elements of the crimes charged. It is unfortunate that the owner of the automobile was unable to testify because of his death prior to trial. In order to prove the essential elements, Appellee had to rely upon circumstantial evidence and inferences which the jury might make from the testimony. As to the unauthorized use charge, the fact

that the owner was upset and searched for his missing car does not lead to the inference that he did not authorize anyone to use it. He may well have consented to its use by someone. Likewise, such evidence does not lead to the conclusion that it was stolen under the Federal charge. It is believed that the case failed in this important respect. It is believed that there is a gap in the proof as to this element. It is recognized that the unexplained possession of goods or an automobile recently stolen permits the inference that the possessor is the thief even though there is no direct evidence of the larceny. Travers v. United States 118 App. D. C. 276, 335 F 2d 698 (1964) and cases cited therein. However, in all cases of this type there appears to be direct evidence of the theft or unauthorized use. It must first be shown that the automobile was taken without the owner's consent and not left to an inference based upon a prior inference.

In addition to the above, the fact of possession by Appellant, which possession is explained in the testimony, does not lead to the inference that he used or operated or drove the car in the District of Columbia, or from the District of Columbia into the State of

Maryland. Furthermore, knowledge that he did not have the owner's consent or that it was a stolen vehicle cannot be attributed to Appellant on the basis of the evidence presented at the trial as proof of lack of consent or theft is again missing.

II. The court erred in its charge to the jury, with respect to the first count of the indictment, in that it instructed the jury as to a crime not charged in the indictment, thereby permitting a verdict of guilty with respect thereto. With respect to the first count of the indictment, quoted above, the Appellant is charged with committing the crime alone. He was charged with personally taking those actions described in the indictment. He was not charged with causing such things to be done by someone else, or otherwise. However by the charge to the jury relative thereto, the jury is permitted to find the Appellant guilty if it found that, with respect to the automobile in question, he "caused it to be taken, used, operated and removed" or "caused it to be operated or driven for his own use and purpose" or "that at the time he ... caused it to be taken, used or operated, he knew that he did so without the consent of the owner." (Tr.pp.139, 140). This charge to the jury goes beyond

the crime charged in the indictment. The Appellant was prepared to defend the crime as set forth in the indictment, but was not prepared to submit evidence to counteract any direct or circumstantial evidence which indicated that he caused the improper actions as distinguished from taking such actions himself. He, as any other defendant, must merely defend against the crime as charged in the indictment. In this case, based upon circumstantial evidence and deductions and inferences drawn therefrom by the jury it is quite possible that the jury might have been misled by the aforesaid instructions. It may have inferred that the Appellant caused the crime rather than actually committing it himself. In the case of Coleman v. United States, 167 F. 2d 837 (C.C.A. Texas, 1948) 837, the court held that the giving of a charge which is not applicable to a case, even though the charge correctly states the law, is error. Since the Appellant was not charged in the indictment with causing the offense to be committed, it is believed there was error in giving the aforesaid instruction. Looking at such jury charge from a different viewpoint, if the contention is made that there was no evidence from which such deduction could be made, the court's attention is directed to the case of

Morris v. United States 326 F.2d 192, (9th Cir. 1963) which cites with approval the following excerpt from United States v. Breitling 20 How. 252, 61 U. S. 252, 15 L.Ed. 900 (1858):

> " It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony."

In view of the above, it is believed the charge was in error in that it gave the jury instructions as to a crime for which the Appellant was not indicted. He was not prepared to defend the same. If there was evidence that he caused the offense, he was not indicted for the same but the court permitted him to be found guilty

thereof. If there was no such evidence then the jury was permitted to conclude guilt under the charge. In any of such events there was error.

III. The Court erred in its charge to the jury defining the essential elements of the crime charged in the first count of the indictment. 22 D. C. Code §2204 contains two distinct elements. In order to be guilty of the crime specified therein the accused must (1) without the consent of the owner, take, use, operate, or remove, or cause to be taken, used, operated or removed from specified places an automobile or motor vehicle and then he must (2) operate or drive or cause the same to be operated or driven for his own profit, use, or purpose. The lower court in its charge to the jury recognizes these two distinct elements. (Tr.p.139). The second element does not require the lack of consent of the owner. Once a person fulfills the requirements of the first listed element, the statute does not require that the second element, which is the driving and operation of the automobile for his own profit, use or purpose, be without the consent of the owner.

The charge to the jury with respect to the elements of this crime is as follows:

"... Now, what are the essential elements of this crime of unauthorized use of a motor vehicle as charged in Count 1 of the indictment? They are these: First, that the defendant took a motor vehicle or that he used, operated or removed that vehicle from any place within the District of Columbia, or that he caused it to be taken, used, operated and removed from any place within the District of Columbia; secondly, that he operated or drove it, or caused it to be operated or driven for his own use or purpose; third, that he did so without the consent of the owner; and, finally, that at the time that he did use it or operate it or remove it, or caused it to be taken, used or operated, he knew that he did so without the consent of the owner." (Tr.pp.139,140).

The third element listed in the above charge appears to refer only to the second element listed therein. In other words, the jury is instructed that the lack of owner's consent is not required for the first element but only with respect to the second element which is the

thereof. If there was no such evidence then the jury was permitted to conclude guilt under the charge. In any of such events there was error.

III. The Court erred in its charge to the jury defining the essential elements of the crime charged in the first count of the indictment. 22 D. C. Code §2204 contains two distinct elements. In order to be guilty of the crime specified therein the accused must (1) without the consent of the owner, take, use, operate, or remove, or cause to be taken, used, operated or removed from specified places an automobile or motor vehicle and then he must (2) operate or drive or cause the same to be operated or driven for his own profit, use, or purpose. The lower court in its charge to the jury recognizes these two distinct elements. (Tr.p.139). The second element does not require the lack of consent of the owner. Once a person fulfills the requirements of the first listed element, the statute does not require that the second element, which is the driving and operation of the automobile for his own profit, use or purpose, be without the consent of the owner.

The charge to the jury with respect to the elements of this crime is as follows:

"... Now, what are the essential elements of this crime of unauthorized use of a motor vehicle as charged in Count 1 of the indictment? They are these: First, that the defendant took a motor vehicle or that he used, operated or removed that vehicle from any place within the District of Columbia, or that he caused it to be taken, used, operated and removed from any place within the District of Columbia; secondly, that he operated or drove it, or caused it to be operated or driven for his own use or purpose; third, that he did so without the consent of the owner; and, finally, that at the time that he did use it or operate it or remove it, or caused it to be taken, used or operated, he knew that he did so without the consent of the owner." (Tr.pp.139,140).

The third element listed in the above charge appears to refer only to the second element listed therein. In other words, the jury is instructed that the lack of owner's consent is not required for the first element but only with respect to the second element which is the

operation or driving of the automobile, or the causing of it to be operated or driven for Appellant's own use or purpose. This is just the opposite of the requirements of the statute. This being so, the jury was not instructed that the automobile had to be taken, used, operated or removed without the consent of the owner as required by the statute. If the third listed element in the charge to the jury was intended to apply to both the first and second elements listed therein, then it is inconsistent with the statute which requires lack of consent only as to the first element. In the case of Mullen v. United States 105 App. D. C. 25, 263 F 2d 275, (1959) the court held that where a jury might well have acquitted a defendant but for an erroneous charge, a conviction will be reversed because of the giving of the charge. It is believed that the charge in this case was confusing to the jury and could have easily been misinterpreted, all to the prejudice of the Appellant.

IV. The first count of the indictment was defective in that it was at variance with the controlling statute. If it should be held that the lack of consent of the owner is required as to both of the elements listed in the controlling statute, then the indictment is defective since

it only charges lack of consent with respect to the second element. Furthermore, the indictment would be defective, in any event, because it is obvious that the lack of consent is required by the statute with respect to the first element and, as stated, the indictment only charges lack of consent as to the second element.

The first count of the indictment reads as follows:

> "On or about September 22, 1967, within the District of Columbia, David Atkinson feloniously did take, use, operate and remove, one certain automobile, property of W. Barrett Fuchs, from a certain street, and did operate and drive said automobile, for his own profit, use, and purpose, without the consent of W. Barrett Fuchs, the owner of said automobile." (Tr.p.139).

Lack of consent of the owner is only charged as to the second element, or the operation and driving of the vehicle for Appellant's own profit, use and purpose. Since he was not charged with the first element of taking, using, operating or removing the vehicle without the consent of the owner, he cannot be found guilty of the crime set forth in the statute. In any event, since he was not

charged with the first element listed and there was a variance with the statute the Appellant was not prepared to defend against the same and a charge to the jury permitting it to find him guilty of such was prejudicial.

CONCLUSION

It is, therefore, respectfully submitted that this Court reverse the judgment of conviction entered below, and direct the entry of a judgment of acquittal.

Respectfully submitted,

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4-28-69
(3)

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 22,170

David Atkinson, Appellant

v.

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SUMMARY OF ARGUMENT

I. Appellee's brief set forth the evidence upon which it is relied to prove the guilt of the Appellant. Even taken in the light most favorable to Appellee, such evidence was not sufficient to sustain a verdict of guilty in this case and no reasonable person could draw inferences from the circumstantial evidence presented to prove Appellant guilty beyond a reasonable doubt.

II. The Appellant had taken the position in his brief that the jury had been instructed as to a crime not charged in the indictment. The Appellee appears to concede this and thereby admit the erroneous instruction.

III. Certain language appearing in the controlling statute, the instructions to the jury and the indictment were misleading and confusing to the jury with the result that Appellant may have been improperly indicted and the verdict returned by the jury may have been improperly rendered.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 22, 170

David Atkinson, Appellant

v.

United States of America, Appellee

Appeal from the United States District
Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. Appellee's own view of the evidence clearly indicates that the evidence presented was insufficient to prove the charges beyond a reasonable doubt.

Appellant in his brief had taken the position that there was a scarcity of evidence to support a guilty

verdict and that the facts which were presented did not form a basis upon which legitimate inferences could be drawn to prove the essential elements of the crime charged. It is believed that the Appellee's own view of the evidence supports this conclusion.

Appellee set forth certain legal points with which the Appellant generally agrees, but it is believed that the legal points are not relevant to the case at hand and do not refute the Appellant's argument as to the insufficiency of the evidence and the lack of factual basis for the formation of proper inferences of other facts necessary to prove guilt beyond a reasonable doubt. After the recitation of the aforesaid legal poonts, the Appellee set forth its version of the facts upon which it relies in this case followed by a conclusion that there was sufficient evidence from which reasonable persons could find guilt beyond a reasonable doubt. Appellee's argument requires an examination of the legal points as they relate to this case, then an examination of the evidence cited by Appellee as the basis

for the case.

Appellee makes the following three legal points: (1) that a person can be convicted upon circumstantial evidence as well as direct evidence or both (Appellee's Brief p.6); (2) that from the possession of stolen property soon after the commission of the crime the jury may infer the guilt of the accused unless satisfactorily explained by the circumstances consistent with innocence (Appellee's Brief p.7), and (3) that there is no legal authority which requires the owner of a vehicle to testify in order to establish ownership or lack of consent when these issues can be established from other sources (Appellee's Brief p.7). The first point is not questioned by Appellant. It is well established that circumstantial and/or direct evidence may form the basis for a verdict of guilty. The second point concerns the inference which may be drawn from possession of stolen property soon after the commission of a crime. It is submitted that the Appellee must first prove a basic fact from which a reasonable person can logically infer or deduce from the proven fact the existence

of another fact. The Appellee failed to prove the basic facts of lack of consent in the unauthorized use charge, the stealing of the automobile in the interstate transportation charge and the lack of knowledge on the Appellant's part as to the taking or stealing generally. The third point suggests that ownership or lack of consent may be established from sources other than by the testimony of the owner of the vehicle. Appellant agrees with such a statement. In fact, ownership was established in this case by stipulation of the parties (Tr.47,48). It is also true that lack of consent may be established other than by direct testimony, but no evidence was introduced in this case to prove the basic fact of lack of consent.

The evidence of Appellee cited in Appellee's brief is as follows: (1) that the owner of the vehicle reported his car missing; (2) that he was very upset because the vehicle was missing; and (3) that, insofar as the owner's wife knew, no one had been given permission to drive the car (Appellee's Brief p.7). Appellant's evidence cited by Appellee in his testimony that an unknown man invited Appellant and his friends to drive to Baltimore; that the unknown man drove the car to Baltimore

and that Appellant only drove the car back from Baltimore after not being able to find the unknown driver (Appellee's Brief pp.7,8). Examination of the transcript does not indicate that even these conclusions as to Appellee's evidence are correct. The only suggestion that the vehicle was reported missing and that the owner was upset because the vehicle was missing appears in the testimony of Officer Danner when he made the statement relative to the owner of the vehicle that "He was a little upset over the fact that his car was missing" (Tr.40). Appellant does not believe that this testimony should have been permitted as it was hearsay and was a conclusion by the witness. The Appellee cited the testimony of the owner's wife to show that he was upset because his car was missing. She never testified to that effect. The most that she said was that he was very upset (Tr.23,24) but never gave the reason for him being upset.

Even taking the evidence of the Appellee in the most favorable light, it is submitted that no reasonable person could infer that Appellant, without the consent of the owner, took and operated the vehicle in the District of Columbia with full knowledge that he

did so without the owner's consent. Likewise, the inference cannot be drawn that the automobile was stolen, that the Appellant knew it was stolen and that he transported it in interstate commerce. No reasonable person could make this inference from the facts that the owner reported his car as missing and was upset about it. Appellee's evidence did not show lack of consent nor did it show the fact of taking or stealing or any knowledge on the part of Appellant that consent was lacking, all important elements in the case.

To arrive at a conclusion of guilt in this case, it was necessary for the jury to first infer that the vehicle was taken without the owner's consent or stolen and then infer that Appellant drove it in the District of Columbia and then infer that he drove it across state lines and then infer that he knew at the time that it was stolen or taken without the owner's consent. In other words, the jury had to base one inference on a prior inference. At no point were the material facts of taking, stealing, lack of consent or lack of knowledge proven from which the jury could infer or deduce the existence of the other facts to arrive at a verdict of guilty. The only facts presented which could lead

to the whole chain of inferences was that the owner of the vehicle was upset, the questionable testimony of the police officer that the vehicle was missing and the fact that the Appellant was in possession of the vehicle in the State of Maryland. This is the whole of Appellee's case. The basic facts of taking without consent or stealing or lack of consent or lack of knowledge thereof could not be inferred from this small bit of evidence. The simple facts introduced in evidence were not sufficient to prove the Appellant guilty beyond a reasonable doubt as to each and every element of both charges.

II. <u>The fact that the jury was instructed as to a crime not charged in the indictment has not been refuted by the Appellee but, on the contrary, appears to be admitted</u>.

Appellant's position in its brief was to the effect that the indictment charged him with personally taking all of the actions constituting the offense of unauthorized use, while the instructions to the jury relative thereto permitted a guilty verdict if the jury found that he did not personally take any of the actions but that he caused the same to be taken by someone else.

Legal precedent was cited by Appellant in its brief to the effect that the giving of a charge to the jury which is not applicable to a case, even though the charge correctly states the law, is error (Appellant's Brief p.12)and that it is clear error for a court to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered and that such a charge would have a tendency to mislead the jury. (Appellant's Brief p.13).

Appellee does not argue against the aforesaid contention of the Appellant or the state of the law in such cases, but remained silent with respect thereto. It is clear that the trial judge in this case instructed the jury that if Appellant caused someone else to commit the offensive actions constituting elements of the crime in question then he could be found guilty of the crime charged. The Appellee argues that there was never any issue in the case as to whether Appellant caused someone else to take the actions constituting the crime (Appellee's Brief p.10). That is the whole point of this argument. The jury was permitted to return a guilty verdict on the basis of a charge which is not applicable to the case and to find Appellant

guilty upon a set of facts which are conjectural and of which no evidence had been offered. It is believed that in this case, which is based generally on circumstantial evidence and inferences necessarily made by the jury to arrive at its conclusion, that the jury should not have been permitted to consider as elements of the crime the alternative of whether the Appellant personally committed the offense or caused someone else to do so.

Appellee further argued that Appellant's proof was directed to proving that he did not actually take the vehicle (Appellee's Brief p.9). This is correct because Appellant was defending against the crime charged in the indictment. Had Appellant been aware that he had to prove that he did not cause the crime, he could have taken proper steps to avoid a verdict on such basis. However, he was not prepared to defend on such basis as he was not so charged. This again points up the injustice to defendant in permitting these instructions to be given to the jury.

The Appellee's whole argument on this point is that the trial judge's instructions must be taken as a whole and pointed out that the trial judge first read

the unauthorized use count of the indictment to the jury and immediately followed with instructions as to the questioned essential elements of the crime (Appellee's Brief pp.8,9). Appellee concluded, therefore, that under such circumstances it was clearly indicated to the jury that they were to find Appellant guilty if they found that he actually took, used, operated and removed the vehicle. It is equally true that they could find him guilty if they found that he caused someone else to do it. Appellee's conclusion does not hold up under close scrutiny. The trial judge was instructing the jury as to the crime with which Appellant was charged. The judge had already instructed them as follows: "Now, although you are the sole judges of the facts, you must look to this Court as the authority on the law and you are duty bound by your juror's oath to follow the law as I shall attempt to expound it to you" (Tr.134). Therefore, the jury followed these instructions. This was the controlling factor and the charge permitted them to arrive at a conclusion of guilt with respect to a crime not charged in the indictment.

Appellee urged that since no objection to the instructions was timely raised, under Rule 30 of the

Federal Rules of Criminal Procedure, the Appellant should be foreclosed from raising any objection for the first time on appeal (Appellee's Brief p.8). Rule 52(b) of the Federal Rules of Criminal Procedure provides as follows: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Rule 30 and Rule 52(b) are designed to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings, and, therefore, such rules are not conflicting but compliment each other. Herzog v. U. S., C. A. Cal. 1956, 235 Fed 2d 664, cert. denied 77 S. Ct. 54, 352 U. S. 844, 1 L. Ed. 2d 59; Lash v. U. S., C. A. Mass. 1955, 221 F 2d 237, cert. den. 76 S. Ct. 55, 350, U. S. 826, 100 L. Ed. 738; Lyons v. U. S. , C. A. Cal. 1963, 325 F 2d 370, cert. den. 84 S. Ct. 1650, 377 U. S. 969, 12 L. Ed. 2d 738.

In order to prevent a miscarriage of justice, a federal reviewing court, in the exercise of a sound discretion, may notice plain and vital errors occurring during trial of a criminal case, though not preserved for review by objection or exception. Page v. U. S., C. A. Mo. 1960, 282 F 2d 807; Harris v. U. S., C. A.

Mo. 1961, 297 F 2d 491; Adams v. U. S., C. A. Okl.1967, 375 F 2d, 635, cert. den. 88 S. Ct. 117, 389 U. S. 880, 19 L. Ed. 2d 173; U. S. v. Pennix C. A. N. C. 1963, 313 F 2d 524; Bradnell v. U. S., C. A. Cal. 1962, 303 F 2d 87. Simmons v. U. S., 92 App. D. C. 122, 206 F 2d 427 (1963).

Because substantial rights of the Appellant are affected and in order to prevent a miscarriage of justice, the Court is urged to exercise its discretion in favor of permitting this point to be raised. It is believed that the point is a valid one and that Appellant's brief amply demonstrates that unless Appellant is permitted to raise the point at this juncture then the ends of justice will not be served.

III. The language used in the instruction as to the elements of the crime of unauthorized use of a motor vehicle and the language used in the first count of the indictment relative thereto were misleading and confusing and at variance with the controlling statute, rendering the instruction erroneous and/or the indictment faulty.

The requirement of lack of consent on the part of the owner appears in the unauthorized use statute and

in the indictment and in the charge to the jury relative thereto. It is believed that the placement of the wording of such requirement in each of these was misleading and confusing to the jury and under such circumstances worked to the detriment of the Appellant.

The questioned language appears at the beginning of the statute (Appellant's Brief p.4) wherein there is a requirement of lack of consent as to the actual taking, use, operation or removal of the vehicle. It does not matter whether the offender has the consent of the owner as to the operation or driving of the vehicle for the offender's own profit, use, or purpose. So long as the offender takes the car without consent and operates it he is guilty, provided he operates it for his own profit, use or purpose. In the indictment, the language appears at the end thereof (Appellant's Brief p.17) and appears to require lack of consent as to the operation and driving of the vehicle for the profit, use and purpose of the Appellant. The indictment states that the Appellant did take, use, operate and remove the vehicle from a certain street and then it goes on to state that he operated and drove it for his own profit, use, and purpose, without the consent

of the owner. It did not state that he did all of these things without the owner's consent and it did not state that he took the car without the owner's consent as required by the statute. In the instruction to the jury, the language appears as the third part in the recitation of four elements of the crime (Appellant's Brief p.15) and appears to require lack of consent only with respect to the second listed element of the crime, the operation and driving of the vehicle for the profit, use and purpose of the Appellant. The trial judge recited the element of taking and then the element of driving the vehicle for the Appellant's own use or purpose and then the element that "he did so without the consent of the owner." (Appellant's Brief p.15). He did not specifically indicate that the lack of consent was required with respect to the first element as does the statute nor did he specifically indicate that it was required as to both the first and second element. Under such circumstances, it would appear that he was referring to the second element when he followed the listing of that element with the above language.

There was no consistent pattern in all of the above to guide the jury and all the items are open to

various interpretations. In order to be consistent it would require an interpretation that all of the illegal actions had to be or were taken without the owner's consent and it is not believed that the language used is that explicit or clear cut. There is too much room for misinterpretation by the jury, especially in this case where the bulk of the evidence against the Appellant is circumstantial requiring inferences to be drawn by the jury as to the facts and then an application of the jury's understanding of the law to those facts.

If the instructions are erroneous or misleading or if the indictment is faulty, then the ends of justice have not been served in this case.

Respectfully submitted,

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